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Supreme Court of the United States

OCTOBER TERM, 1928.

No.

CENTRAL NEW ENGLAND RAILWAY COMPANY,
Petitioner,

v.

BOSTON & ALBANY RAILROAD COMPANY, ASSIGNOR FOR THE BENEFIT OF NEW YORK CENTRAL RAILROAD COMPANY, *Assignee, Respondent.*

BRIEF FOR THE RESPONDENT.

The petitioner seeks a writ of certiorari to review a judgment of the Superior Court for the County of Suffolk, in the Commonwealth of Massachusetts, rendered against the petitioner July 30, 1928, pursuant to a rescript from the Supreme Judicial Court, in an action of contract in which the respondent is plaintiff and the petitioner defendant.

The contention of the respondent in this brief is that there is nothing in the proceedings in said action that calls for such review.

The case disclosed by the record may be briefly stated as follows:

The Central New England Railway Company, a corporation organized under the laws of the State of New York at some time between May 9, 1898, and October 25, 1899, became the lessee of the Hartford & Connecticut Western Railroad Company, under a lease the term of which ran to August 30,

1940. By Chapter 386 of the Special Acts of the Massachusetts Legislature for the year 1889, the Hartford & Connecticut Western Railroad Company, a Connecticut corporation, was authorized to extend its road into Massachusetts (Record, p. 29). Under this authority, said lessor in 1899 commenced the construction of a branch line from Tariffville, Connecticut, to a point on the line of the Boston & Albany Railroad, at Agawam, in Massachusetts. On October 25, 1899, while said branch was being constructed, the Central New England Railway Company and the Boston & Albany Railroad Company entered into the trackage agreement which is the basis of the action which petitioner asks this court to review. This agreement is set out by copy as "Exhibit 3" (Record, p. 47). It obligated the Boston & Albany Railroad Company to continue the trackage rights specified in the agreement to August 30, 1940, which, it will be observed, was the date when the term of the lease of the Hartford & Connecticut Western Railroad Company to the Central New England Railway Company would expire. The trackage agreement secured to the latter company the right to operate its freight and passenger trains over the tracks and in the yards, engine houses and station of the Boston & Albany Railroad Company during the entire period named, with the right to use other facilities as required. The tracks over which this trackage right was granted were those from Agawam Junction to Springfield, there to connect with the Boston & Maine Railroad and the New York, New Haven & Hartford Railroad Company, as well as with the Boston & Albany. While there was a fixed price of $15,000 per annum for this right if the trains did not exceed a certain number per day, there appears to be no limit to the number of trains the Central New England Railway could run, with a proportionate advance in the price. There were other provisions for compensation in the agreement, which, unlike the fixed sum above named, depended upon the extent of the service rendered.

The branch line built by the Hartford & Connecticut West

ern Railroad Company was completed, so that the Central New England Railway Company began to operate trains over it on September 15, 1902. Between the date of the trackage agreement aforesaid (October 25, 1899) and the date when such operation began, the Boston & Albany Railroad Company had leased its entire line to the New York Central & Hudson River Railroad Company, the lessee succeeding to all rights and assuming all obligations under said agreement. Later in 1914, by consolidation, the New York Central & Hudson River Railroad Company became a part of the New York Central Railroad Company, which in turn succeeded to all rights and assumed all obligations of the Boston & Albany Railroad Company under said agreement. Neither of these transactions caused the Central New England Railway Company to suspend the exercise of its trackage rights under the agreement, and it continued to exercise them until December 15, 1921, making all payments that fell due under the terms of said agreement up to that date. It will also be observed that in its proceedings before the Interstate Commerce Commission, hereinafter referred to, the Central New England Railway Company, in referring to this trackage agreement, said, "This agreement is in force at this date" (Original Exhibits, p. 16), and that in the stipulation for omissions from the record for the purposes of this proceeding it was agreed that the petitioner's petition for certiorari "does not present and is not intended to present any question as to the legal execution and validity of the contract in suit except as it may be claimed to have been affected by the order of the Interstate Commerce Commission issued September 8, 1921, nor any claim that the plaintiff and its assigns have failed to perform said contract so far as it and they were permitted by the defendant to perform it" (Record, p. 81). The only effect that these transactions have had is that, in accordance with state procedure, the plaintiff was required to amend its writ in the action at law by substituting the Boston & Albany Railroad Company, Assignor, as plaintiff in place of the New York Central Railroad Company, upon the technical ground

that only the party named in a sealed instrument could sue upon it.

On June 15, 1921, the Central New England Railway Company filed with the Interstate Commerce Commission its application "for a certificate of public convenience and necessity under Section 1 of the Interstate Commerce Act, as amended by the Transportation Act, 1920, permitting the abandonment of operation of its line between Feeding Hills, Massachusetts, and Agawam Junction, Massachusetts" (Original Exhibits, p. 12). It will be observed that the line the operation of which is sought to be abandoned is but a small portion of the line from Tariffville to Agawam Junction, which was being constructed by the Hartford, Connecticut and Western Railroad when the trackage agreement above referred to was executed. That line was 14.35 miles in length, being partly in Connecticut and partly in Massachusetts, and Feeding Hills was an intermediate station on that line. The portion for which abandonment was sought was 1.87 miles and lay wholly in Massachusetts (Original Exhibits pp. 15 and 35). It will also be observed that while the application states that the applicant proposes "in addition to abandon the operation of its trains between said junction and Springfield, Massachusetts, over the tracks of the Boston & Albany Railroad," it does not ask for any certificate or order covering that proposed additional abandonment (Original Exhibits, p. 12). Confining itself within the scope of the application, the certificate and order of the Commission in terms went no further than to permit "the abandonment by the Central New England Railway Company of its line of railroad extending from the station at Feeding Hills in the town of Agawam to a point where said line connects with the Boston & Albany Railroad" (Original Exhibits, p. 36).

It is further recited in this application, presumably as reasons for granting it, that "applicant's lines are operated as a part of the system of the New York, New Haven and Hartford Railroad Company, and all freight on said Tariff-

ville branch destined to and from Springfield and beyond can be handled over applicant's main line and the New York, New Haven and Hartford Railroad via Hartford, Connecticut." It does not appear to be stated definitely when the applicant began to be operated as a part of the New Haven system, but it does appear that the New Haven interjected itself into the situation as early as October 28, 1914 (Record, p. 22).

It appears that notice of the foregoing application was given by publishing a copy of it in the *Springfield Republican* on June 24, July 1, and July 8, 1921 (Original Exhibits, pp. 14 and 32).

The only evidence that appears to have been before the Commission (unless the allegations of the application are regarded as evidence) was contained in the written questions put to the applicant and the written replies of the applicant thereto, contained in the Questionnaire which is made a part of the record in Exhibit 32 (Original Exhibits, pp. 13-32). It is recited in the Commission's report that "the case was submitted without formal hearing" (Record, p. 46). Of course the Commission may have made independent investigations of its own, as it had an undoubted right to do—and we are not here calling attention to these facts with any purpose of attacking the validity of the action they took, but as a matter of some interest in view of the petitioner's contentions. It does not appear that the trackage agreement heretofore referred to was ever before the Commission in the original or by copy. The information given to them about it seems to be rather meager. All that was said in the application was quite consistent with the applicant's view of it as an arrangement which it might abandon at will, or at most that it would make its own arrangements for abandonment (Original Exhibits, p. 12). In the applicant's answer to Question 1 of the Questionnaire, the existence of a contract between the applicant and the Boston & Albany Railroad Company, providing for joint facilities and trackage rights between Agawam and Spring-

field, dated August 25, 1899 (1889?) and to expire August 30, 1940, and providing for an annual payment of $15,000, is stated as then in force (Original Exhibits, pp. 15, 16). There is also a brief reference to this trackage agreement in the report of the Commission, in which it is recited that the agreement expires August 30, 1940 (Record, p. 46). There is no reference whatever to this agreement or to the abandonment of operation under it in the certificate and order of the Commission (Record, p. 47). Further interesting facts which appear in the answer of the applicant to Question 5 of the Questionnaire are that there were then first mortgage bonds of the Hartford & Connecticut Western Railroad Company aggregating $700,000, maturing July 1, 1923, resting in part on the line sought to be abandoned and the earnings thereof, the applicant being merely the lessee and not the owner of said line (Original Questionnaire, p. 17).

On September 8, 1921, the Interstate Commerce Commission issued its certificate (Record, p. 47). In one respect it purported to give the Central New England Railway Company something more than it had applied for. The application had sought merely for a certificate that would permit it to abandon *operation* of 1.87 miles of railroad, extending from Feeding Hills to Agawam Junction. The certificate purported to authorize the abandonment *of the line itself*. It is to be noted, however, that it nowhere appears in the record that the Central New England Railway Company has ever abandoned the line. The contrary fairly appears. On or about April 26, that company removed the rails for several hundred feet east of the east end of Agawam Bridge in order to prevent any possibility of cars getting away and fouling the main line of the New York Central, and to prevent any possibility of accident (Record, pp. 25, 27). The testimony of the general superintendent of the New York, New Haven & Hartford Railroad Company and superintendent of the Central New England Railway Company was that at the time of the trial the line from Feeding Hills to Agawam Junction was *abandoned for service or operation*. No doubt the cer-

tificate of the Interstate Commerce Commission was understood by the petitioner (and properly so) to relate to operation only, as sought in the application.

Having in mind the petitioner's assertion of the mandatory character of this certificate, it is interesting to note that it took no action under it until November 9, 1921, when its president and general manger sent to the vice-president of the respondent Boston & Albany Railroad, New York Central Railroad lessee, the notice, Exhibit 7 (Record, p. 8), that it would cease to make use of the license and permission acquired by it by virtue of contract of October 25, 1899, on December 15, 1921, thus selecting its own time for putting the permitted abandonment into effect. The notice stated that the Central New England Railway Company would discontinue payments under the contract after December 15, 1921. A long correspondence followed (Record, pp. 8–18), in which the respondent's representative sought to ascertain from the petitioner, not the authority under which it was to cease operation of its line from Feeding Hills to Agawam Junction, but upon what ground it asserted the right to cancel the trackage contract. The substance of this correspondence appears to have put the petitioner's claim of such right upon the ground that the contract was nothing but a license terminable at the will of either party (Record p. 15).

On April 5, 1922, an action at law was brought in the Superior Court for the County of Suffolk, by the New York Central Railroad Company against the Central New England Railway Company for breach of the aforesaid trackage agreement, upon the view that the former company as assignee of the agreement could recover in its own name. We have already referred to the fact that before judgment was entered in this action, the writ was amended by substituting the Boston & Albany Railroad as assignor for the New York Central Railroad Company as plaintiff, in accordance with the rescript of the Supreme Judicial Court. It is not correct to say that the action was specifically to recover damages of the total sum of $15,000 per year for the balance

of the term from December 15, 1921, to August 30, 1940. The declaration sought damages for the breach of contract whatever they might be found to be (Record, p. 37). The answer was (1) a general denial, which under Massachusetts practice put in issue every material allegation of the declaration; (2) that by reason of the wrongful acts of the plaintiff and the Boston & Albany Railroad Company, and for other reasons, the alleged contract had become impossible to perform; and (3) that the certificate of the Interstate Commerce Commission issued September 8, 1921, was a defense to the action (Record, p. 38). At the beginning of the trial of the action (February 8, 1927) the defendant made a motion to dismiss for want of jurisdiction, specifying as the grounds therefor (1) that the Transportation Act of February 28, 1920, gave the Interstate Commerce Commission exclusive jurisdiction of the subject matter involved in the case; (2) that that Commission had acted upon the subject matter involved in the suit by its order of September 8, 1921; (3) that the Commerce Act as amended had given to that Commission such jurisdiction of the subject matter of the case as to exclude the court from any jurisdiction thereof; and (4) that the Commerce Act as amended, and Sections 207 and 208 of the Judicial Code, had given to the Federal Courts exclusive jurisdiction of the subject matter of the case in such way as to exclude the state courts from any jurisdiction thereof. This motion to dismiss was then denied. It was renewed in the same form after the evidence in the case was all in (no doubt upon the ground that the evidence had disclosed what the pleadings did not) and was then again denied (Record, pp. 44, 45).

It is not correct to say that the defendant's evidence of the report and certificate of the Interstate Commerce Commission was excluded. It was admitted (Record, p. 27), as was also the more extended copy of the record of the Interstate Commerce Commission offered by the plaintiff as Exhibit 32 (Original Exhibits, pp. 11–36). It is true, however, that the trial court ruled and instructed the jury that it

was not a defense to the action (Record, p. 35), and was not to be considered upon the question of liability.

The ruling of the trial court on the effect of the Commissioner's Certificate by no means ended the trial. Failing in that defense, the defendant offered many other defenses. It contended that the trackage agreement had never been properly executed; that it was beyond the power of the Boston & Albany to make it; that it could not be assigned to the successors of that company; that that company and its successors had not performed their part of the contract; that it had never repudiated the contract, but had retained its rights under it; that consequently the damages, if any, must be limited to the single quarterly installment of $15,000 that had accrued prior to the bringing of the action; and that the plaintiff had sustained no damage, but had derived a real benefit from the cessation of operation under it. Much of the evidence was offered upon these questions during the trial, which lasted from February 8 to February 21, 1927 (Record, p. 45). Many of these matters have become immaterial in the present proceeding, for other obvious reasons as well as because of the terms of the stipulation under which much of the record was omitted at the request of the petitioner (Record, pp. 81–85). The petitioner waived any question concerning the measure of damages applied by the state courts; any question as to the legal execution and validity of the contract in suit, except as it may be claimed to have been affected by the order of the Interstate Commerce Commission, and any claim that the plaintiff and its assigns had failed to perform the contract so far as it and they were permitted by the defendant to perform it. The entire bill of exceptions of the plaintiff, which related only to the trial court's rulings on the measure of damages, was thus omitted (Record, p. 85). The charge of the judge in the trial court shows that there were submitted to the jury the questions (1) whether the contract was made, (2) whether the defendant repudiated it (Record, p. 33), and (3) the damages sustained (Record, p. 36).

The petitioner went to the Supreme Judicial Court upon its bill of exceptions. Such parts of that bill of exceptions as it deems material in this proceeding are set out in the record. Its exceptions were overruled by that court, except in one particular as to parties, which was permitted to be cured by amendment. The opinion of that court is set out in full in the record. The nine reasons assigned in the petition for certiorari all relate to alleged errors in that opinion (Record, pp. 5–7). The material questions submitted to that court by the petitioner's bill of exceptions, out of which all the errors are alleged to have grown, are simply these:

First, was the petitioner as defendant in the action at law entitled to have a verdict directed in its favor?

Second, had the state court jurisdiction of the action?

(See Court's summary of matters involved in defendant's exceptions (Record, p. 61); also petitioner's brief, pages 14 and 15.)

ARGUMENT.

I.

The federal questions, if any, presented by this petition for certiorari must stand upon the record of the case as submitted to the Supreme Judicial Court of Massachusetts, and cannot be enlarged by the petition to that court for re-argument.

The petitioner has seen fit to incorporate in its petition to this court an allegation that after the rescript of that court it applied to the Chief Justice for a re-argument that in that application it "set out clearly that private contracts were affected by force of the Act of Congress, and that the intention of the Commission as to any particular obligation was quite immaterial," and that this application was denied (Petition, pp. 4–5). It has also incorporated in the record a motion to stay judgment in the Superior Court while the application is being considered, and the allowance of that motion by a justice of said Superior Court.

It is well settled that such an application is no part of the state procedure, cannot be filed as a matter of right, and does not become a part of the record of the case.

Powers v. *Sturtevant*, 200 Mass. 519.

It also is well settled in this court that such an application comes too late to raise a federal question.

Pim v. *St. Louis*, 165 U. S. 273, 274.
Harding v. *Illinois*, 196 U. S. 78, 84.
Godchaux v. *Estopinal*, 251 U. S. 179.
Tidal Oil Company v. *Flanagan*, 263 U. S. 444, 455.

And a mere denial of such petition by the state court without opinion is not enough to give it any standing.

Looker v. *Schroeder*, 149 U. S. 580, 585.
Sayward v. *Denny*, 158 U. S. 180, 183.
Missouri Pacific R R. Co. v. *Hanna*, 266 U. S. 184.

It therefore does not appear in the record that the distinction attempted to be raised by the application, if of any importance, was seasonably presented to the Supreme Judicial Court.

II.

There are certain allegations in the petition for certiorari which obviously are not supported by the record.

1. It is alleged that the "petitioner constructed the branch line referred to from its lines in the south through Feeding Hills, Connecticut, to a point of connection on the Boston & Albany Railroad known as Agawam Junction" (Petition, pp. 1–2). As we have heretofore pointed out, the record shows that this line was built by the Hartford & Connecticut Western Railroad Company, of whose road the petitioner had a lease which was to expire August 30, 1940, and which had mortgaged the road to secure its bonds.

2. It is alleged that the petitioner operated the branch with a gradually decreasing number of trains from September 15, 1902, to December 15, 1921 (Petition, p. 2). In fact, the drop to a single round trip per day occurred in 1917, after the petitioner had begun to be operated as a part of the New Haven system.

3. It is alleged that the petitioner in May, 1921, applied to the Interstate Commerce Commission for a certificate of public convenience and necessity covering the abandonment of its operation over the branch line "and the Boston & Albany tracks from Feeding Hills into Springfield." As we have heretofore pointed out, the record shows that the certificate of public convenience and necessity applied for covered only the abandonment of *operation* of the 1.87 miles of track from Feeding Hills to Agawam Junction.

4. It is alleged that "termination of the contract, on which suit is brought, was necessarily incidental to your petitioner's carrying out the Commissioner's order." There is nothing in the record that supports this allegation.

5. It is alleged that the opinion of the Supreme Judicial Court was based on the theory that by the Transportation Act of 1920, Congress had authorized the Interstate Commerce Commission to sanction the abandonment of a contractual obligation such as existed in this case. We do not understand that the opinion went any further than to say that if the court assumed, without deciding, that such a construction be given to the act, it would not help the petitioner because it did not then appear that the Commission had intended to exercise such authority. As we shall show later, this assumption was made in favor of the petitioner, and in accordance with its own contention as set forth in its motions to dismiss (Record, p. 44).

III.

There was nothing in the decision of the Supreme Judicial Court which entitles the petitioner to maintain this petition for certiorari.

To avail the petitioner, the federal right relied on must, of course, be one that was asserted in the highest court of the state, and denied, to his injury.

1. The power of Congress to abrogate private contracts in the interest of interstate commerce is asserted by the state court in terms broad enough to suit the petitioner (Record, p. 66).

In its brief submitted with its petition for certiorari, at page 20, it says:

> "The claim of a federal right is based upon the paramount power of Congress to legislate concerning interstate commerce even to the extent of cutting across or abrogating private contracts. The Supreme Judicial Court of Massachusetts, on conclusive authority, admitted this power."

Again in the brief, at page 21, it says:

> "The case does not draw in question the constitutional validity of the federal statutes involved, so that it is not a case in which an appeal could be allowed."

This was a ruling very obviously sought by the petitioner and there would seem to be no occasion for us here to discuss it.

2. The state court further asserts that in the exercise of this power Congress may authorize the Interstate Commerce Commission to permit an interstate carrier "to abandon an existing obligation without thereby incurring a liability" (Record, p. 67). As an abstract proposition, this, too, would seem to be a ruling in favor of the petitioner's contentions. We are not aware that the petitioner objects to it as such. It would be rather difficult to see how, if the petitioner were not satisfied with this general proposition, it could allege in its petition that the "termination of the contract, on which suit is brought, was necessarily incidental to your petitioner's carrying out the Commission's order" (Petition, pp. 3–4), or how it could contend in its motion to dismiss that "the Transportation Act of February 28, 1920, . . . gave to the Interstate Commerce Commission the exclusive jurisdiction of the subject matter involved in this case" (Record, p. 44); or how it could fairly argue, as it does in its Brief, at page 24, that the respondent should have gone to the Commission for compensation for the damages it suffered from the abrogation of its contract.

As it seems clear that the petitioner could have suffered no injury from this ruling of the Supreme Judicial Court, there would seem to be no occasion for us here to discuss it.

3. The opinion of the Supreme Judicial Court makes clear the way in which the case was presented to it. On page 65 of the Record it says, "We shall consider the motion of the defendant to dismiss, in connection with its motion for a directed verdict." Again, at page 66, it says, "The matter of first importance, because it affects the jurisdiction of the court, is the contention that the certificate of public convenience and necessity issued to the defendant by the interstate commerce commission is a defence to this action." It seems clear that, as the petitioner then presented its case, the motions to dismiss and the motion for a directed verdict

rested on the same basic contentions of the petitioner. The motion to dismiss was as follows (Record, p. 44):

"*Motion to Dismiss (as Amended)—Filed Feb. 8, 1927.*

Now comes the defendant in the above entitled action and moves that this cause be dismissed on one or all of the following grounds, the defendant moving that this motion be in amendment of the motion to dismiss heretofore filed.

(1) Because the "Transportation Act of February 28, 1920," 41 Statutes at Large 474, which amended the Interstate Commerce Act of February 4, 1887, as amended, gave to the Interstate Commerce Commission the exclusive jurisdiction of the subject matter involved in this case.

(2) Because the Interstate Commerce Commission in pursuance of the Interstate Commerce Act of February 4, 1887, as amended by the Acts of June 29, 1906, April 13, 1908, June 13, 1910, February 17, 1917, March 2, 1917, May 29, 1917, August 10, 1917, and February 28, 1920, has acted on the subject matter involved in this suit and issued its order thereon, a copy of which is hereto annexed and marked Exhibit 'A' and made a part of this motion.

(3) Because the Interstate Commerce Act of February 4, 1887, as amended by the Acts of June 29, 1906, April 13, 1908, June 13, 1910, February 17, 1917, March 2, 1917, May 29, 1917, August 10, 1917, and February 28, 1920, has given to the Interstate Commerce Commission such jurisdiction of the subject matter of this case as to exclude this Court from any jurisdiction thereof.

(4) Because the Interstate Commerce Act of February 4, 1887, as amended by Acts of June 29, 1906, April 13, 1908, June 13, 1910, February 17, 1917, March 2, 1917, May 20, 1917, August 10, 1917, and February 28, 1920, and Sections 207 and 208 of the Judicial Code, being Act of March 3, 1911, 36 U. S. Statutes at Large 1148, and Act of October 22, 1913, 38 U. S. Statutes at Large 219, have given to the Federal Courts exclusive jurisdiction of the subject matter of this case in such a way as to exclude this Court from any jurisdiction thereof."

The Exhibit "A" referred to in paragraph (2) of this

motion comprised a certified copy of the report and certificate of the Commission, which appears on pages 45, 46 and 47 of the printed Record.

In view of the foregoing contentions of the petitioner, we submit that it cannot successfully be argued that the petitioner was denied any federal right when the court assumed, evidently for the purposes of the argument, that the Act of Congress had, as claimed by the petitioner, given to the Commission jurisdiction of "the subject matter involved in the case," whether that assumption was as a matter of law right or wrong.

Surely the subject matter of the suit was the trackage agreement that existed between the petitioner and the respondent, the right of the respondent to recover damages for the petitioner's breach of it, and the petitioner's contention that it had been abrogated by the action of the Commission.

Having assumed what, upon the record, it was justified in regarding as the contention of the petitioner concerning the power of the Commission, the Supreme Judicial Court rightly said that it remained to consider whether the Commission had exercised the power which it had been assumed Congress had conferred upon it [Record, p. 69].

Obviously the record disclosed no evidence that the Commission had attempted to abrogate the trackage agreement. The material parts of its certificate are as follows:

> "It is hereby certified, That the present and future public convenience and necessity permit the abandonment by the Central New England Railway Company of its line of railroad extending from the station of Feeding Hills in the town of Agawam to a point where said line connects with the Boston & Albany Railroad, both in Massachusetts, as described in the application and report aforesaid:
>
> "It is ordered, That said Central New England Railway Company be, and it is hereby, authorized to abandon said line of railroad."

It may be true, as the petitioner says, that a cessation of

operation of its trains on this line would prevent it from operating trains on the Boston & Albany Railroad from Agawam Junction to Springfield; but that is a very different proposition from saying that it constituted a determination by the Commission that the trackage agreement with the Boston & Albany Railroad Company was to be abrogated without any liability whatever of the petitioner to the respondent for damages. It is obvious that the Commission carefully refrained from the use of any language that could be said to indicate any consideration or decision by them of the fate of the trackage agreement or as to the rights that remained to the parties under it. It did not in terms even authorize the abandonment of operation under it. Its certificate made no response to it whatever.

Nor could it properly be said that the abrogation of the trackage agreement by the Commission was implied in any of the language it used, either in its report or in its certificate. It mentioned an operating revenue of $2,686.04 and operating expenses of $41,518.62, resulting in an operating loss of $38,832.58, for the year 1920. Whether the $15,000 payment or any other payments to the Boston & Albany Railroad Company or its assigns were included in the $41,518.62 or not, or, in other words, whether what it called the operating loss was properly to be regarded as $38,832.58 or $23,832.58, was not shown to be a determinative factor in its right to issue the certificate. Even if it considered the $15,000 or some portion of it as a fixed charge from which the petitioner might not be relieved by the certificate, the operating loss from which the petitioner would undoubtedly be relieved was amply sufficient, so far as financial considerations were concerned, to warrant its issue of the certificate. It was therefore properly said by the court that the fact that it issued the certificate was no proof that it had decided one way or the other as to whether this $15,000 was or was not, either wholly or in part, an obligation from which the petitioner would be relieved by ceasing the operation of its trains. The record furnishes no

justification whatever for the petitioner's argument that the certificate of the Commission was of no value to the petitioner unless it relieved it from any liability on the trackage agreement.

Apart from this obvious lack of any evidence in the record from which it could be inferred that the Commission had assumed to abrogate the trackage agreement, other matters referred to in the opinion of the Supreme Judicial Court are very persuasive in leading the legal mind to the conclusion that it had no such intention. As the opinion states, there was no formal hearing, and the respondent was not made a party to the proceedings. The petitioner attempts to destroy any significance that might be given to this situation by calling attention to the fact that the notice specifically required by the Act of Congress under which the Commission acted was given by notice of the application to the Governor of Massachusetts and by publication in the *Springfield Republican* (Petitioner's Brief, p. 2). The published notice consisted of a copy of the application, and of course contained no intimation that the Commission were to consider whether the trackage agreement in question should be abrogated or the rights of the parties thereto adjusted in those proceedings (Original Exhibits, pp. 32-34). As previously stated, the application asked nothing more than a certificate of public convenience and necessity, permitting the abandonment of operation of the line between Feeding Hills and Agawam Junction. But this minimum of notice was not all that the Act of Congress contemplated. It provides further that "(19) the application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the commission may from time to time prescribe, and the provisions of this Act shall apply to all such proceedings."

The improbability that the Commission would attempt to pass upon the matters involved in this suit without notice to this respondent, and an inquiry as to how its interests would be affected by the abrogation of the trackage agreement, loses nothing of its significance by the petitioner's argument that

the constructive notice required by law was given. It took a long trial in the Superior Court to show how the interests of the respondent were affected by the petitioner's repudiation of the agreement; and all the material evidence there presented would be appropriate for the consideration of the Commission if it were assuming jurisdiction of the matters involved in that action, as the petitioner then contended it had done. It will not be assumed, of course, that the Interstate Commerce Commission, in its fostering care of the transportation systems of the country, would have any more concern for the welfare of the petitioner than for that of the respondent. We submit that, if the Commission supposed that it was passing upon the question whether the contract between the parties should be abrogated, it would have taken pains to hear from both of them.

If further corroboration were needed of the proposition that the Interstate Commerce Commission did not attempt to abrogate the contract, it is found in its view of its own power as expressed in a decision rendered by it in another case, October 24, 1927, after the trial of this action in the Superior Court. In that case the Chicago, Rock Island & Pacific Railway Company applied to the Commission for a certificate that public convenience and necessity permitted its abandonment of the *right* to use a line of the Denver & Rio Grande Western Railroad Company between Denver and Pueblo, under certain trackage agreements. The Commission dismissed the application for want of jurisdiction, holding that such a *right* was not a *railroad* within the meaning of the statute, and while it had power to permit the applicant to *cease operation*, it had no jurisdiction over the contractual right of one carrier to operate over the road of another. The Commission also expressed its doubts as to whether its certificates in abandonment cases, which were permissive only, could have any controlling effect over the agreements themselves, but said it was not their function to determine the legal effects of their orders.

Abandonment of Line by C., R. I. & P. Ry. Co., 131 I. C. C., 421.

Whether the Commission's view thus expressed as to its powers under the statute was right or wrong, it plainly shows that it did not assume jurisdiction over the subject matter involved in the action which the petitioner asks this court to review.

An earlier decision of the Commission shows that in issuing a certificate of public convenience and necessity under the Act of Congress, permitting a carrier to abandon the operation of a part of its line, it did not consider such certificate as a release of the carrier from its contractual obligations. The Maine Central Railroad applied to the Commission for permission (1) to purchase at a price not exceeding $60 a share all the outstanding stock of the Hereford Company, whose road it had leased for 999 years from May 1, 1890, at an annual rental of $64,500 a year, besides maintenance charges and taxes, and (2) having purchased the stock, to abandon the road. The road lay almost wholly in Canada, only .67 of a mile of its track being in New Hampshire. The Commission granted permission to purchase the stock, and certified that public convenience and necessity permitted the abandonment of that small part of the road which lay in New Hampshire, provided the Maine Central first established certain joint rates with other railroads, which it offered to do. Evidently the Commission thought that the lessee railroad was acting properly in assuming the entire loss which resulted from the abandonment, even though its certificate, which applied only to a small link of the line, might well have prevented the practical operation of any part of it.

Control of Hereford Railway, 99 I. C. C. 7.

It seems perfectly clear, therefore, that the Interstate Commerce Commission had not the slightest idea that by its certificate of September 8, 1921, it was deciding that the petitioner would no longer be liable to the respondent in any way upon the trackage agreement. It may be that if the petitioner, during the trial of the action in the Superior Court, had known that the views of the Commission were

those later expressed in the Rock Island case above cited, it would have framed its motions, requests and exceptions upon a different theory, as it unsuccessfully attempted to do in its petition for re-argument. But the duty of the Supreme Judicial Court was merely to consider them as they were framed, and the petitioner cannot here complain that it did so. It cannot maintain this petition upon theories not there relied upon or considered.

It may be that the reason why the petitioner, in its application to the Interstate Commerce Commission, did not even ask for a certificate permitting it to abandon operation from Agawam Junction to Springfield, but merely stated its intention to do so (presumably meaning that it would do so if the certificate covering operation from Feeding Hills to Agawam Junction were granted), was that it felt confident that the trackage agreement was nothing but a mere license revocable at will, or that if it was anything more than that, the damage would be insignificant, as contended in its correspondence and in the trial of the case. If such were its reasons, they make still more clear the lack of any intention of the Commission to assume any jurisdiction of the subject matter involved in that case.

In its brief the petitioner contends that the Supreme Judicial Court erred in considering the lack of any evidence of an intention on the part of the Commission to relieve the petitioner from further liability on its contract as a factor in its conclusion, because, as it says, the intention of the Commission was wholly immaterial. We have already endeavored to show that the petitioner can have no relief on this ground, because its own contention made it material. This contention not only appeared directly in its answer, its motions and its requests for rulings, which asserted that the order of the Commission was a defense to the action, because the Commission had passed upon the subject matter of the suit, but it appears to be a necessary corollary to the petitioner's construction of the Act of Congress which, it says, was intended to relieve a carrier from all liability on con-

tracts concerning a road which it was permitted to stop operating. If true, this would, of course, include contracts with other carriers, whose interests might be seriously affected. Whatever results the statute contemplates, it is only the action of the Commission that sets them in motion. It is the Commission that is to determine whether those results are such in its judgment as are consistent with public convenience and necessity, and in the interest of the transportation systems which are their especial care. Why should not the judgment of the Commissioners be material upon any matter that is assumed to be necessarily affected by the statute under which it acts?

IV.

There is nothing in the Act of Congress upon which the petitioner relies that gives to the certificate of the Interstate Commerce Commission the effect of relieving the petitioner from any further liability on the trackage agreement.

If in spite of the limited issues submitted to and decided by the state courts, it is regarded as open to the petitioner to contend that the certificate of the Commission had this unintended effect, it is necessary to consider the purpose of the Act and its terms.

1. And first as to the situation which it was intended to remedy. Sometimes railroads could abandon their entire lines because they had become so unprofitable that to compel them to run trains was confiscatory. Sometimes their charter provisions were permissive only and they could cease operation at will. Sometimes their charter or contractual relations were such that they could abandon their roads only with the permission of the state or states under which they were organized. And sometimes their charters were subject to forfeiture or they were compelled through receivership proceedings to sell their roads to satisfy the claims of their creditors. We know of no case where abandonment of its railroad was regarded as an easy method of getting rid of its debts.

When Congress, after the close of Federal control taken during the war, sought "affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country," it deemed it wise to put an end to this heterogeneous control, and to put the protection of the public interests in the hands of the Interstate Commerce Commission. In doing so it dealt not merely with the abandonment of roads, but also with their construction, giving to the Commission the power to decide in either case whether the proposed construction was required or the proposed abandonment permitted by public convenience and necessity. "The authority to find the facts and to exercise thereon the judgment whether abandonment is consistent with public convenience and necessity, Congress conferred upon the Commission." "The sole test prescribed is that abandonment be consistent with public necessity and convenience."

Colorado v. *U. S.*, 271 U. S. 153, 166, 168.

2. The Transportation Act of February 28, 1920, amended Section 1 of the Interstate Commerce Act, by inserting parts (18), (19) and (20), which are as follows:

> "(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment.

"(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the commission may from time to time prescribe, and the provisions of this Act shall apply to all such proceedings. Upon receipt of any application for such certificate the commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints of the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

"(20) The commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both."

Attention is called to certain features of this Act.

(*a*) It is not mandatory in the sense in which the petitioner argues. No railroad is required to apply to the Commission for action under it. If it does so, its application is purely voluntary. So far as this Act is concerned, the petitioner might have continued to operate its trains from Feeding Hills to Springfield at least until August 30, 1940. The only mandatory feature about it is that the railroad cannot abandon without first obtaining the certificate of the Commission. This is prohibitory rather than mandatory.

(*b*) The certificate issued by the Commission under this Act is permissive only. This appears clear from the scope of part (18) which requires a like certificate for an extension of a railroad, or the construction of a new line of railroad, or the acquisition or operation of any line of railroad or extension thereof, or any engaging in transportation over or by means of such additional or extended line. If a railroad which had obtained a certificate authorizing it to construct or operate any of these roads, either because it found it impossible to raise the necessary capital, or because it met with unexpected or insurmountable physical difficulties, or for any other reason that made the project hazardous or undesirable, gave up the project and chose to take no action under the certificate, it would violate no provision of this Act, or of any other law that we know of. The same rule would hold true as to the abandonment provision; for the same purposes and language and the same terms of the Act apply alike to constructions and abandonments, except that in the latter case it is perhaps made more emphatic by the use of the word "permit." It also is true that a railroad that has obtained such a certificate is not required to act upon it immediately. The certificate does not outlaw. It remains in force whenever the railroad chooses to act upon it, unless it be sooner revoked. This is true not only because practical considerations require that construction, but also because of the language of part (20) which not only provides that the railroad may act "*from and after* issuance of the

certificate, and not before," but also provides that the penalties there imposed are to be inflicted only on those who act without the certificate, and not on those who fail to act with it. The petitioner attempts to avoid this reasoning by asserting that the Act gives the petitioner no alternative but to act on the certificate, because otherwise it would be guilty of "a violation of the mandate of Section 15*a* (2) and (3) of the Interstate Commerce Act for 'honest, efficient and economical management.'" The petitioner, however, loses sight of the fact that, if there were anything in this argument, it would apply equally to all the provisions of the Act in question, and would require applications to be made for certificates, quite as much as action under them when granted. Furthermore, we do not suppose that it will be contended by the petitioner that the record shows that it ever asked the state courts to construe the section of the Interstate Commerce Act last cited. It follows, we submit, that the petitioner was right in assuming that it was under no obligation to act upon the certificate until more than three months after it was issued, since it was not required to act upon it at all unless it chose to do so, and its action when taken, like its application for the certificate, was purely voluntary. The petitioner, claiming that there is no difference in the effect of a permissive and of a mandatory order, has cited some cases that deny the right of third parties to interfere with the right of the railroad to act under it. But we are not arguing in favor of any right of third parties to interfere with the action of the party to whom the certificate is issued. It is as to the applicant itself that the certificate is merely permissive.

(*c*) The permissive character of the certificate shows the fallacy of the argument that the certificate of itself constituted a defense to the action, and of the revised argument that the statute itself gave that effect to the certificate regardless of the intent of the Commission. If the petitioner had not applied for the certificate and then decided to act under it, there would have been no breach of the trackage

agreement. The petitioner argues that if our view of the statute is correct, a railroad desiring to anbandon its line would be obliged to choose between abandonment and continued operation. It is equally true, of course, that a railroad that applied for permission to construct a new line would have to choose between its probable capital expenditure and the probable income from it, and ordinarily it would try to make such choice before it applied to the Commission for a certificate. In either case its choice might turn out to be unfortunate.

(*d*) There is nothing in the purpose of the statute, nor in its language, that indicates an intention to exempt carriers from all liability on their contracts or provides any machinery for dealing with such matters. There is not a word in the statute which indicates that it had any other purpose than the obvious one of forbidding interstate railroads to do certain things without the certificate of the Commission that the proposed action was consistent with public convenience and necessity. It does not even require that they do them.

3. There is no merit in the petitioner's contention that an implied right to repudiate its contracts with impunity is given by the statute in question. The right of a party to a lawful contract to repudiate it and take its chances of being compelled to pay substantial damages is, of course, not questioned. A right to specific performance rests in the court's discretion, and is not necessarily an incidental contract remedy. It is not contended that the respondent could have compelled the petitioner to operate its trains between Agawam Junction and Springfield, either before or after the passage of the Transportation Act. All the respondent had was a right to recover its damages for breach of the contract by the petitioner, and this right, we say, the statute did not take away. So far as we are aware, this court has never said that such a result would follow from a statute of this kind. The petitioner, we believe, says that it presents a question never decided by this court.

A consideration of the practical consequences of the peti-

tioner's contention will expose its fallacy. If it is true, its application is not to be limited to a trackage agreement like the one in question. It must equally apply to every contract the specific performance of which is inconsistent with action of the railroad permitted by a certificate of the Commission. It is matter of common knowledge that many of the railroads of the country are operating large parts of their systems under leases, in many of which the rentals are very high; that many of them have contracts for the use of the tracks of other roads; that many of them have contracts with terminal companies; that many of them have contracts for supplies and for services running into the future, sometimes for extended periods; that many of them have large amounts of outstanding bonds secured by mortgages on all or parts of their systems, or bonds secured by mortgages on their leased lines whose payment they have guaranteed. It would be useless to attempt to enumerate all their contractual relations. Many others will doubtless suggest themselves to the Court. Applications for the certificates provided for in the statute under consideration may be for abandonment of the railroad's entire line, as well as for a part of it. Is it conceivable that this statute was intended to relieve the applicant of every contract the specific performance of which was rendered impossible by the action of the applicant under the certificate of the Commission? The petitioner may be right in calling this a question of importance, if there is any likelihood that this court would adopt any such construction of this statute; but to us that possibility seems too remote to require the serious consideration of the court.

An examination of the records of the Commission will show that when there has been an application for abandonment of a leased line, it has been quite customary for lessor and lessee to join in the application, probably because the terms have been arranged between them, as in the Hereford Railway case above cited.

Of course, when the petitioner got its lessor, the Hartford, Connecticut & Western Railroad Company, to build this new line from Tariffville to Agawam Junction, it must have

entered into new contractual relations with it concerning the rental and other matters. We wonder if the petitioner thinks the certificate of abandonment abrogated or modified those contractual relations, or whether it has agreed with its lessor that it will continue them in spite of the statute. For example, if there is anything in the petitioner's arguments, of course the petitioner ought not to be paying the interest on so much of the mortgage debt as was contracted in building the abandoned line, since that would not be an honest and efficient way of carrying on its business.

4. There is no useful analogy between this case and the rate cases upon which the petitioner places so much reliance.

(*a*) Rates are clearly mandatory, and do not depend upon their acceptance by the railroads.

(*b*) Some of their features are expressly fixed by statute, and contracts in conflict therewith are made unlawful.

(*c*) This Court has never shown any disposition to deprive parties, even in those cases, of any remedy when justice seemed to require one.

Louisville & Nashville R. Co. v. *Mottley*, 219 U. S. 467, often cited as sustaining the petitioner's contention, merely denies the right of specific performance and declines to consider whether the plaintiff had some other remedy.

In *New York Central & Hudson River Railroad Co.* v. *Gray*, 239 U. S. 583, where Gray had received a contract for transportation in part payment for his services as an architect, which contract the railroad was prohibited from performing by the Hepburn Act, it was not only held that he was entitled to recover, but that his action was properly brought in the state court (the City Court of New York), this Court saying that in permitting recovery the state court "was simply administering the applicable principles of state law, and did not run counter to the Act of Congress."

In *Ortega Co.* v. *Triay*, 260 U. S. 103, a suit to enjoin a receiver from collecting rates on an electric railroad in excess of those fixed by contract, it was held that the injunction was properly denied, but the Court further said: "Necessarily, therefore, we affirm the action of the District Court, but

while this denies the relief the Ortega Company prays against the appellee, we do not wish to be understood as adjudging that the company may not be entitled to some remedy for the non-observance of the contract of the Tacoma Company. See *Louisville & N. R. Co.* v. *Crouch*, 156 Ky. 27; 160 S. W. 750."

For other cases in which it was intimated that a refusal of specific performance was not to be regarded as a denial of any other remedy, we refer to the following:

Armour & Co. v. *Dallas*, 255 U. S. 280, 286.

Beasley v. *Texas & Pacific Ry. Co.*, 191 U. S. 492, 496, 497.

Texas & Pacific Ry. Co. v. *Marshall* 136 U. S. 393, 405.

Louisville & N. R. Co. v. *Johnson, Admx.*, 207 Ky. 813.

Louisville & N. R. Co. v. *Letcher County C. & I. Co.*, 243 S. W. 45.

St. Paul & Tacoma Lumber Co. v. *Northern Pacific Ry. Co.*, 4 Fed. 2d, 359.

It will be noted that we are not here concerned with any question as to the measure of damages. As to that matter, the petitioner makes no complaint. It was the respondent that complained of that in the state court. The petitioner did not. Furthermore, it has been expressly stipulated that, since that question is not to be raised, evidence as to damages is omitted from the record (Record, p. 81). Petitioner's motion for a directed verdict, and its contentions as to the effect of the certificate of the Commission, were based on the theory that it was a *complete defense*, and not a *partial defense*. Nevertheless, it is our duty to point out that the record does not warrant the assumption that the respondent rendered no consideration for the annual payment of $15,000 except the use of its facilities as they stood at the time that the petitioner began operation under the trackage agreement. The record affords no evidence that such was the fact, and the petitioner does not appear to have offered any.

It does appear that Mr. Biscoe testified, on cross-examination by the petitioner, that some changes were made in the tracks in the Liberty Street yard while the petitioner was operating under the agreement, and that some changes in the Springfield yard were made, work on which began in 1918 (Record, p. 19). It is a fair inference that in all such capital expenditures the respondent had in mind providing for all the needs of the road, including provision for the trains which the petitioner had the right to run. There was no provision in the agreement that the petitioner should contribute to the cost of these capital expenditures otherwise than by the $15,000 payments. Both Truden and Curry testified that the facilities of the respondent were ample to take care of its own trains and six round trips per day of the petitioner in 1921 (Record, pp. 22 and 24).

If we are right in our contention that both the application of the petitioner for a certificate under the statute and the petitioner's action under it are to be regarded as voluntary acts on its part, it seems clear that it cannot thereby be relieved from liability for its breach of the trackage agreement; and this is true, even though its conduct results in what may be termed legislative action.

Re Companies' Acts, 117 Law Times, 60.
Stanton v. *New York & Eastern R.R. Co.*, 59 Conn. 272.
Proctor v. *Union Coal Co.*, 243 Mass. 428.
John Soley & Sons Inc. v. *Jones*, 208 Mass. 561.
United States v. *Gleason*, 175 U. S. 588, 602.
Day v. *United States*, 245 U. S. 159.
Jones v. *United States*, 96 U. S. 24, 29.

In this case it also appears that it was the petitioner's voluntary action in diverting its traffic to the New Haven road that occasioned its application.

V.

There is no question that the trackage agreement was not a revocable license.

If there ever was any substantial question on this point, it is not here open to the petitioner (1) because this was a Massachusetts contract, made and to be performed in that state, and its construction involves no Federal question; (2) because the petition presents no such question; and (3) because the validity of the contract and its performance by the respondent and its assigns are conceded in the stipulation of the parties (Record, p. 81).

If, nevertheless, this court reserves the right to construe the contract itself, because of the nature of the questions raised, as in *Railroad Commissioners of Texas* v. *Eastern Texas Railroad*, 264 U. S. 79, we submit that it can reach no other conclusion than that adopted by the state courts—that it was an agreement binding on both parties up to August 30, 1940.

It would seem to be absurd to argue that under the circumstances which the petitioner says accompanied the making of this agreement, the respondent could have terminated it at will.

The following authorities appear to establish the view of it taken by the state courts:

Union Pacific Ry. Co. v. *Chicago, etc., Ry. Co.*, 163 U. S. 564.

Joy v. *St. Louis*, 138 U. S. 1.

Franklin Tel. Co. v. *Harrison*, 145 U. S. 459.

M'Kell v. *Chesapeake & Ohio Ry. Co.*, 175 Fed. 321.

Texas & P. R. Co. v. *Louisiana Public Service Commission*, 12 F. (2d) 798.

Western Union Tel. Co. v. *G. R. & Banking Co.*, 227 Fed. 276.

King v. *David Allen & Sons Bill Posting, Ltd.*, 2 Appealed Cases 1916, 54.

Great Northern Railway Co. v. *Manchester, Sheffield, etc., Ry. Co.*, 5 De Gex & Sm., 138.

Llanerch & Dock Co. v. *London & N. W. Ry. Co.*, L. R. 8 Ch. App. 942.

R. H. White Co. v. *Remick & Co.*, 198 Mass. 41.
United Merchants R. & I. Co. v. *American B. Co.*,
128 N. Y. Supp. 666.
Collister v. *Hayman*, 183 N. Y. 250.
10 A. L. R. 1110.

To say that because this agreement uses the word "license" it must be revocable at will, is a mere play upon words. It is necessary to consider all the terms of the agreement and the circumstances under which it was made.

VI.

The state court had jurisdiction of the case.

The petitioner in its motion to dismiss states four grounds for the motion. The first three of these, as we have shown, are based upon its contention that the Transportation Act gave the Interstate Commerce Commission exclusive jurisdiction of the subject matter involved in the action, and that it had exercised that jurisdiction. We have shown that the Commission never attempted to pass upon the question whether the respondent had a right of action against the petitioner for breach of the trackage agreement, and that no such action on its part is to be inferred from its certificate that public convenience and necessity permitted the petitioner to abandon the operation of its line from Feeding Hills to Agawam Junction. In granting this certificate it was considering public interests only and not private rights.

There remains the fourth ground stated in the motion—that the Federal Courts have exclusive jurisdiction of the case. In support of this contention the petitioner relies upon Sections 207 and 208 of the Judicial Code, which gave to the Commerce Court jurisdiction of "suits to enjoin, set aside, annul or suspend any order of the Interstate Commerce Commission," and Act of October 22, 1913, which abolished the Commerce Court, and transferred its jurisdiction to the District Court of the United States.

The answer to the petitioner's contention is that the action

in question is not a suit to enjoin, set aside, annul or suspend an order of the Interstate Commerce Commission. The respondent does not attack the certificate issued September 8, 1921, nor question the power of the Commission to issue it. It would be as useless for the respondent to ask the District Court to set aside the Commission's certificate as it would have been to ask the Commission to decide whether it had a right of action on the trackage agreement, and what damage, if any, it was entitled to recover. The petitioner now says that the lack of any intention on the part of the Commission to deal with the matters involved in the action is wholly immaterial and that it is the Transportation Act which constitutes its defense. We say (1) that this distinction is not open to the petitioner because it was not presented seasonably to the state court, and (2) that, if it is open, it is clear that that Act was not intended to deal with any such question. In this state of things, there is nothing in the statutes relied on by the petitioner which deprives the state court of jurisdiction to entertain an action of this kind, even if its decision is subject to review, in the discretion of this Court.

New York Central & Hudson River R.R. Co. v. *Gray*, 239 U. S. 583.

See also *Great Northern Railway* v. *Merchants Elevator Co.*, 259 U. S., 285, and cases collected in note, page 295, and references therein to *Cheney* v. *Boston & Maine Railroad*, 227 Mass. 336, as *contra*, cited in the opinion of the Supreme Judicial Court (Record, p. 70).

Also the following state court decisions:

Louisville & N. R. Co. v. *Crowe*, 156 Ky. 27.

Louisville & N. R. Co. v. *Johnson, Admx.*, 207 Ky. 813.

Louisville & N. R. Co. v. *Letcher County C. & I. Co.*, 243 S. W. 45.

VI.

SUMMARY

The respondent asks that the petition for certiorari be denied.

1. Because there has been no decision in the state court of any Federal question properly raised by the petitioner, of which it can rightly complain in this proceeding. Its failure there was due to lack of evidence to sustain the proposition it then advanced.

2. Even if there is a Federal question, upon the record it has so little merit that the Court, in the exercise of that discretion which it has in certiorari proceedings, might well decline further to entertain it.

Respectfully submitted,

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